**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|---|---|---|
| **GILBERTO GOMEZ-RAMIREZ**<br>Claimant<br><br>VS.<br><br>**ESQUEDAS TRASH SERVICE**<br>Uninsured Respondent<br><br>AND/OR<br><br>**WORKERS COMPENSATION FUND** | ) | Docket No. **1,060,625** |

## ORDER

Respondent and Kansas Workers Compensation Fund (Fund) request review of the January 17, 2013, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. Chris A. Clements, of Wichita, Kansas, appeared for claimant. Herbert P. Brackeen, of Wichita, Kansas, appeared for respondent. Kendall R. Cunningham of Wichita, Kansas, appeared for the Fund.

The record on appeal is the same as that considered by the ALJ and consists of the June 28, 2012, preliminary hearing transcript, with exhibits; the discovery deposition of Gilberto Gomez-Ramirez taken June 18, 2012; the evidentiary deposition of Hector Sanchez, with exhibits, taken July 17, 2012; and, all pleadings contained in the administrative file.

## ISSUES

The Administrative Law Judge (ALJ) found that the prevailing factor in claimant's current symptoms and need for medical treatment was due to the work accident on April 16, 2012. The ALJ ordered that respondent to pay temporary total disability benefits, medical expenses and mileage.

The Fund and respondent request review of whether claimant's accidental injury arose out of and in the course of employment. The Fund argues the ALJ exceeded her jurisdiction in assessing all benefits against the Fund. The Fund argues that due to respondent's business being sold, respondent is liable to pay for claimant's benefits.

Claimant asks the Board to affirm ALJ Fuller's Order.

The issues raised on review are:

1. Did claimant sustain a personal injury by accident arising out of and in the course of his employment with respondent? Specifically, was claimant's accident the prevailing factor causing his injury and need for medical treatment?

2. If so, did the ALJ exceed her jurisdiction in finding that all benefits are assessed against the Fund?

## FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant has worked as a trash truck driver for respondent since February 15, 2011. He drove the trash truck and would also help co-workers lift trash containers that averaged 200 pounds. Occasionally, claimant would have to work by himself for a couple of hours.

Respondent provided services for both business and residential customers. It was a different route depending on which day of the week, Monday through Friday. Each route had approximately 300-350 customers. Respondent had two trash trucks, but one was used for a back up. Respondent only had two employees, claimant and his helper, Hector Sanchez.

Claimant received $500 a week and was paid every Friday. Claimant testified that Mr. Sanchez was paid partially in cash and the remainder by check.

Claimant described his April 16, 2012, injury:

> I was performing my job, I was almost done with the work. It was about 4:00 p.m. we were about to finish our day's work. We only had eight to ten more customers on the route that day. And we had this where we had many trash bags. My co-worker picked up the bin to empty that. And as I usually did every time I saw there were extra bags or extra trash I would help to make it easy for him and to speed things up. I picked up several heavy bags. And then I got this one that was particularly heavy. I threw it inside the truck, but I didn't do it well enough that I didn't make it all the way in to the truck. And I wanted to prevent it from falling. And that's when the accident happened, when I tried to prevent it from falling. And that's when the accident happened, my back popped. It hurt so bad that I couldn't finish with the bags.[1]

[1] Gomez-Ramirez Depo. at 17-18.

Claimant testified that Mr. Sanchez witnessed the accident. Claimant completed his route by taking the truck to the landfill, called his boss at the end of the day and told him about the back injury. At his deposition, claimant testified that he did not work the day after the accident. However, at the preliminary hearing, claimant testified that he reported to work the next day at 5 a.m. and also stated:

> He saw that I was limping along with a stick, with a stick to support me because I wasn't able to walk completely. He said I couldn't work like that, that I should go home, or that I should go look for some kind of help wherever, or whoever I would have to go with. The best decision I could make was to go with a chiropractor, because I needed to look for some type of solution to my problem, because I wasn't even able to walk. With all kinds of sacrifices and however I could, I managed to drive to the chiropractic doctor, he -- I tried to walk in, but I couldn't, so they brought me a wheelchair. That's how it went for about three or four days that they had to use a wheelchair. Afterwards I got a little better. I couldn't walk and I still cannot walk completely and that's why I'm using the crutch. When I went to the chiropractor, it did help with the pain, but then when I would go home, within about a couple of hours, then I would have even more pain and I would have to take pills for the pain. To this date, the pain has not gone away, on the contrary, it continues still in different parts of my body, my right foot falls asleep sometimes.[2]

Claimant testified he sought treatment from Dopps Chiropractic Clinic and saw a chiropractor every day for approximately two weeks. He did not have any money to continue paying the chiropractor. Claimant testified the treatments helped but his pain would still go away and then come back. He would have pain from his toes to his shoulder. Claimant currently has pain at the waist level.

The last day claimant worked was April 16, 2012. Respondent terminated claimant as of April 21, 2012. Claimant testified that respondent advised him the day he was terminated that his bills would be taken care of.

Juan Esqueda, former owner of respondent, testified that he had the business for approximately 11 years. He and his wife sold the trash service, on May 24, 2012, after claimant's accident, to Mark Raccuglia, for the sum of $216,000. Mr. and Mrs. Esqueda received $72,000 immediately and the remaining $144,000 to be paid in 18 monthly installments of $8,000 each.

Mr. Sanchez lost his license due to a DUI so Mr. Esqueda hired claimant to drive the trash truck. The plan was that when Mr. Sanchez's license became reinstated, he would return to his duties as the truck driver and claimant would move to the helper position. However, claimant's wages would not be reduced.

---

[2] P.H. Trans. at 15.

Mr. Esqueda confirmed claimant's testimony that he was notified of the accident around 6 p.m. on Monday evening. Mr. Esqueda testified that he saw claimant park the trash truck and it appeared that claimant was walking normally. Mr. Esqueda agreed to pay claimant's medical expenses if claimant provided him with a doctor's slip. Mr. Esqueda denied that he fired claimant, but did tell claimant that he could not return to work until he brought in a doctor's release. Mr. Esqueda also denied offering to pay claimant's medical expenses. However, Mr. Esqueda did admit he agreed to reimburse claimant for his chiropractic expenses.

Mr. Esqueda agreed to provide the documents relating to the sale of the business and his tax returns for 2011. Mr. Esqueda testified that he would not be able to pay for a surgical procedure for claimant's back if the surgery cost $25,000 and an additional $10,000 for follow-up treatment. Respondent did not have workers compensation insurance coverage on the date of claimant's accident.

Hector Sanchez was deposed on July 17, 2012, and testified he previously worked as a truck driver and helper for respondent. At the time of claimant's accident, Mr. Sanchez had a driver's license issue so he could not drive the trash truck. Mr. Sanchez indicated that when he got his driver's license back, he and claimant would alternate driving. Mr. Sanchez got his license reinstated in February 2012. According to Mr. Sanchez, he and claimant never discussed whether claimant had objections to working on the back of the truck as a helper.

Mr. Sanchez was present when the accident happened but he did not actually see it. He knows that claimant was lifting some bags and he thought it was filled with sheetrock. Claimant verbalized his pain while he was holding his back and walking very slowly. Mr. Sanchez corroborated claimant's testimony that he went to the landfill in order to empty the trash truck and that claimant was at work the following morning.

## PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(b) and (c) provides:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
>
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 44-508(h) provides:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

Respondent and the Fund raised several arguments as to why claimant failed to prove he sustained a personal injury by accident arising out of and in the course of his employment with respondent. Respondent first argues that there were no eye witnesses to the accident and claimant acted normally after the alleged accident. While Mr. Sanchez did not see the accident, he observed claimant hold his back and verbalize pain. Claimant testified that following the accident, due to back pain, he had to let Mr. Sanchez drive for a short period of time. There is little evidence to refute that claimant injured his back in the manner he described.

Respondent and the Fund next contend that claimant was unhappy with the prospect that he was going to have to work as a helper and fabricated his claim. In its brief the Fund stated, "It is certainly not beyond the realm of possibility that the allegations being made by claimant in this case have their genesis in this pending employment change."[3] Claimant never testified that this prospect was upsetting to him and Mr. Sanchez testified he and claimant never discussed the matter. Mr. Esqueda testified that claimant was not happy with the prospect of being a helper once Mr. Sanchez's license was reinstated, but did not elaborate. Simply put, the argument that claimant filed this claim because he was unhappy to have to work as a helper is a red herring and unsupported by the evidence. Stated another way, respondent and the Fund, with nary a scintilla of evidence, infer that claimant filed a fraudulent claim.

Respondent and the Fund next assert that claimant did not prove by a preponderance of the evidence that his accident was the prevailing factor causing his injury or need for medical treatment. K.S.A. 2011 Supp. (f)(2)(B)(ii) states that an injury by accident is only compensable only if the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment. K.S.A. 2011 Supp. 44-508(g) states:

> "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and

---

[3] Resp. Brief at 2 (filed Feb. 18, 2013).

any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[4] Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.[5]

Respondent refused to provide medical treatment for claimant's injuries and claimant testified he is financially unable to afford medical treatment on his own. None of the parties employed a medical expert to examine claimant and render an opinion as to whether the work accident was the prevailing factor causing claimant's injury or need for medical treatment. The term prevailing factor is not mentioned in the Dopps Chiropractic records. Claimant testified that as a result of the accident, he has right shoulder pain and back pain that radiates into the right leg to the top of the right calf. The only logical explanation for the cause of claimant's injuries was the April 16, 2012, accident. Based on the evidence in the record, ALJ Barnes concluded that it was more likely than not that the prevailing factor for claimant's current symptoms and current need for additional medical treatment was the work accident of April 16, 2012. This Board Member concurs.

The next issue is whether ALJ Barnes exceeded her jurisdiction by assessing all benefits ordered against the Fund. K.S.A. 2011 Supp. 44-532a(a) provides that if an employer has no insurance . . . and such employer is financially unable to pay compensation to an injured worker as required by the workers compensation act, the ALJ may order the Fund to pay the benefits.

The Board does not have jurisdiction to review this issue. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.[6] This includes review of the preliminary hearing issues listed in K.S.A. 2011 Supp. 44-534a(a)(2) as jurisdictional issues, which are: (1) whether the employee suffered an accident, repetitive trauma or resulting injury, (2) whether the injury arose out of and in the course of the employee's employment, (3) whether notice is given, and (4) whether certain defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act. In *Payne,*[7] a Board Member stated,

> It may have constituted error for the ALJ to assign liability to the Fund without first making a determination that the respondent had no insurance and is financially unable to pay the ordered compensation to claimant, but such an omission does not

---

[4] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[5] *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[6] K.S.A. 2011 Supp. 44-551(i)(2)(A).

[7] *Payne v. Copp Transportation,* No. 268,622, 2007 WL 1041038 (Kan. WCAB Mar. 8, 2007).

> render the order invalid or subject to an appeal at this stage of the proceedings. As counsel are aware, the Board has stated on numerous occasions that its jurisdiction to hear appeals from preliminary hearing orders is limited.

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[8] Accordingly, the issue on appeal that ALJ Barnes exceeded her jurisdiction by ordering the Fund to pay claimant's benefits, is dismissed.

## CONCLUSION

1. Claimant proved by a preponderance of the evidence that he sustained a personal injury by accident arising out of and in the course of his employment with respondent.

2. The Board is without jurisdiction to consider the issue of whether ALJ Barnes exceeded her jurisdiction in ordering the Fund to pay claimant's benefits and, therefore, that issue is dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[10]

**WHEREFORE**, the undersigned Board Member finds that the January 17, 2013, preliminary hearing Order entered by ALJ Nelsonna Potts Barnes is affirmed.

**IT IS SO ORDERED.**

Dated this _____ day of May, 2013.

_____
HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

---

[8] See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

[9] K.S.A. 44-534a.

[10] K.S.A. 2011 Supp. 44-555c(k).

e: Chris A. Clements, Attorney for Claimant
cac@cl.kscoxmail.com; rdl@cl.kscoxmail.com
Herbert P. Brackeen, Attorney for Respondent and its Insurance Carrier
hbrackeen@ictlaw.kscoxmail.com
Kendall R. Cunningham, Attorney for Workers Compensation Fund
Kcunningham@gh-wichita.com; sstuerke@gh-ks.com
Nelsonna Potts Barnes, ALJ